No. 18640

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

OLA BELLE MEREDITH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S ANSWERING BRIEF.

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Jurisdiction.

This Court has jurisdiction to review the judgment of the District Court under Title 28, U. S. C., Section 1291, as this is an appeal from a final order of the District Court for the Southern District of California, granting defendant's (appellee's) motion for summary judgment. The principal contention of the defendant is that the District Court was required to dismiss the action of the plaintiff in the lower court for the reason that said District Court lacked jurisdiction of the subject matter, and of the United States as defendant, by reason of Title 28, U. S. C., Section 2680(k).

Statement of the Case.

The plaintiff, Ola Belle Meredith, was the dependent wife of Donald Warren Meredith, who was stationed in and near Bangkok, Thailand, during 1959 and 1960. On about January 15, 1960, the plaintiff was admitted

to the Bangkok Nursing Home, a private hospital in Bangkok, Thailand, under the care of Dr. Chou Chuang Svetarundra, for a Caldwell-Luc operation. At the time of her admission to said hospital, the plaintiff's condition was diagnosed as a chronic sinus condition, requiring more than mere conservative treatment. Dr. Chou Chuang Svetarundra was on a U. S. Embassy approved list of medical specialists, and the plaintiff was referred to Dr. Chou Chuang Svetarundra by Captain Herbert I. Cohen, Captain USAF Medical Corps, assigned at that time to the Medical Unit of the American Embassy in Bangkok, Thailand. A description of the functions of the Medical Unit can be found in the Affidavit of Lewis K. Woodward, Jr., attached as an exhibit to the Government's Second Motion for Summary Judgment filed on November 11, 1962. Please see paragraph 3, first page, Affidavit of Lewis K. Woodward, Jr. In order to enter the right sinus antrum, it was necessary for Dr. Chou Chuang Svetarundra, who was a specialist in eye, ear, nose and throat medicine, to force a hole through the outer wall of the right anterior antrum, in order to clean out and treat the infected sinus area. Dr. Cohen was not "scrubbed" and did not assist in the operation. He merely observed it, as a matter of personal interest. See plaintiff's (appellant's) own Memorandum of Contentions of Fact and Law filed 9-7-62, p. 2 of the letter of Dr. Cohen attached as exhibit.

Although it is not clear exactly when the plaintiff first experienced diplopia (double vision) in the right eye, apparently the plaintiff developed the condition of which she now complains only after the Caldwell-Luc operation.

Prior to going to Dr. Chou Chuang Svetarundra at Government expense, the plaintiff and her husband apparently had some personal interviews with Dr. John Cameron, the Foreign Service doctor at the Medical Unit in the Bangkok Embassy of the United States, and also with Dr. Herbert I. Cohen, with regard to treatment of her condition. The plaintiff claims that she was forced by the doctors at the American Medical Unit to submit to the operation to be performed by Dr. Chou Chuang Svetarundra. Appellee, however, considers the clear and uncontroverted fact to be that the choice of allowing herself to be operated on by Dr. Chou Chuang Svetarundra was made by the plaintiff without duress of any type, and with a full disclosure having been made to her of all of the ramifications of that choice. In any event, this is a question of fact which need not be reached in this appeal, as the claim of the plaintiff would seem to be entirely disposed of by Title 28, United States Code, Section 2680(k). But plaintiff's (appellant's) own memorandum of Contentions of Fact and Law filed 9-7-62 contains as an exhibit a letter from Dr. Cohen indicating the true facts.

The American Medical Unit administered treatment of a "family physician" nature, and was responsible for the care of approximately 3,000 American personnel in and around the American Embassy in Bangkok. Dr. Herbert I. Cohen was the Military Medical Physician attached to the Medical Unit in question. Far from being a specialist of any type, Dr. Cohen was, in fact, in no position to do more for the plaintiff than refer her to a Thai physician for treatment of her condition when it worsened. At no time did the American doc-

tors, Dr. Cameron or Dr. Cohen, represent to the appellant that they were experts in the treatment of sinus conditions. At no time did they represent to the plaintiff that they were qualified to perform operations of any type. At no time did they represent to the appellant that she could not go to Clark Field or anywhere else for treatment, nor did they declare that the plaintiff was barred from going to any doctor of her choosing in the Bangkok area, at Government expense. In fact, how could the Embassy doctors have acted otherwise? And planes left weekly.

It appears that prior to her arriving in Bangkok, Thailand, the plaintiff had experienced chronic sinus conditions in other parts of the world. Please see the statement of Dr. Herbert I. Cohen, attached to the plaintiff's Memorandum of Contentions of Fact and Law, filed September 7, 1962, *supra*.

Plaintiff has never claimed that the diagnoses of Doctors Cohen and Cameron was wrong in any way. That their treatment by them did not consist of a delicate and specialized operation such as a Caldwell-Luc operation would seem to be irrelevant under the facts of the case. The only overt act capable of being recognized at all as a causative factor in injuring the nerve within appellant's sinus which caused the plaintiff's diplopia (apparently) was the operation performed by Dr. Chou Chuang Svetarundra. Obviously, the referral, whether negligent or otherwise, of the plaintiff to Dr. Chou Chuang Svetarundra, and later to Dr. Kobchai by the American medical personnel, would not be actionable under the Tort Claims Act. (Please see Argument, *infra*).

The court below found that 28 U. S. C. §2680(k) barred the plaintiff's recovery in her claim, and that no material issues of fact remained.

Issues Presented.

1. Title 28, United States Code, Section 2680(k) barred the plaintiff's recovery upon her complaint, and appellee was entitled to judgment as a matter of law.

2. The event or incident which caused the plaintiff's diplopia is not known, but the only overt act which could have possibly caused plaintiff's injury occurred outside of and some distance from the grounds of the United States Embassy in Bangkok, Thailand.

3. Even assuming *arguendo* that some act or event allegedly occurring on the United States Embassy grounds in Bangkok and committed by United States employees, in some way contributed to plaintiff's diplopia, no judicial decision has construed 28 U. S. C. 2680(k) as meaning that "foreign country" does not include a United States Embassy abroad, for purposes of the Tort Claims Act.

ARGUMENT.

I.

Title 28, United States Code, Section 2680(k) Barred the Plaintiff's Recovery Upon Her Complaint, and Appellee Was Entitled to Judgment as a Matter of Law.

Title 28, United States Code, Section 2680(k) provides:

> "§ 2680. Exceptions
>
> The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> (k) Any claim arising in a foreign country."

The language appears plain enough on its face in Section 2680(k) to preclude any doubt as to its meaning. Congress evidently did not desire to have Tort Claims actions decided on the basis of foreign law, since it is universally conceded that the law of the place where the tort occurred will control substantive claims for personal injury in tort. See *Patrick v. United States,* 316 F. 2d 9 (3d Cir. 1963), citing *Mass. Bonding Company v. United States,* 352 U. S. 128. See also, *Richards v. United States,* 369 U. S. 1, decided October 1961.

The United States has not consented to be sued upon the facts alleged in plaintiff's complaint. See *United States v. Spelar,* 338 U. S. 217. The States of the Union and the Territories over which the United States has the power to enact laws are the only territorial components which Congress intended to include for purposes of consenting to suit under the Tort Claims Act. See *Callas v. United States,* 253 F. 2d 838, cert. den. 357 U. S. 936. The United States clearly makes

no laws as a sovereign respecting the various compounds and buildings located in Bangkok, Thailand, except as permitted by the law of Thailand.

Congress in prescribing the application of the Federal Tort Claims Act with regard to the exception contained in 28 U. S. C. §2680(k) intended that the words "any claim arising in a foreign country . . ." be used in a "common non-technical sense." See *Juanita Burna v. United States of America,* 240 F. 2d 720 (4th Cir. 1956), which was cited on that point in *Callas v. United States, supra.* The *Burna* opinion said,

> ". . . terms like 'provisional administration' and 'residual sovereignty' invested with ad hoc meanings, may serve usefully to express certain ideas in particular context, but they are, after all, not the precise limits Congress prescribed for the application of the Federal Tort Claims Act. Such terms of special coinage are interesting to examine, and sometimes they may shed light on an inquiry; but we must not be deluded into substituting them for entirely different statutory words which have clear meaning and were apparently used in a common non-technical sense."

The *Burna* opinion stated that even though in that case the United States "could at any time set aside Japanese laws on Okinawa, the court still could not find that Okinawa was a part of the United States and not a foreign country." The *Burna* opinion considered that Congress intended to eliminate problems such as the absence of United States courts in foreign countries, the difficulty of bringing defense witnesses from

the scene of the alleged tort in a place far removed to the trial, and reluctance of Congress to have issues of liability decided according to theories foreign to our system of law. The *Burna* case cited the language of Judge Yankwich in *Hichino Uyeno v. Acheson,* District Court, Washington Northern District, 96 F. Supp. 510 at 515. Judge Yankwich said in that opinion,

> "It is obvious that the words 'foreign state' are not words of art. In using them, the Congress did not have in mind the fine distinction as to sovereignty of occupied and unoccupied countries . . . When the Congress speaks of 'foreign state' it means a country which is not the United States or its possessions or colony. . . . The interpretation called for is that of common speech and not that derived from abstract speculation on sovereignty as affected by foreign military occupation."

On page 4 of the brief of the United States in support of its Motion for Summary Judgment, the following dialogue is set forth, between Congressman Robsion and Francis M. Shay, Assistant Attorney Gen., which appellee now repeats for purposes of emphasis:

> *Mr. Shay:* ". . . claims arising in a foreign country have been exempted from this bill . . . This seems desirable because the law of the particular state is being applied. Otherwise it will lead, I think, to a good deal of difficulty."
>
> *Mr. Robsion:* ". . . you mean by that any representative of the United States who committed a tort in England or some other country could not be reached under this?"

Mr. Shay: "That is right—that would have to come to the Committee on Claims in the Congress." [1946]

The court in the *Spelar* case, *supra*, granted certiorari (336 U. S. 950) after the Court of Appeals, in the *Spelar* case, reversed the District Court which had dismissed the complaint for want of jurisdiction because the claim was one "arising in a foreign country". The claim occurred in Newfoundland. That air base is leased for ninety-nine years by Great Britain to the United States.

II.

The Event or Incident Which Caused the Plaintiff's Diplopia Is Not Known, but the Only Overt Act Asserted by the Plaintiff Which Could Possibly Have Caused Plaintiff's Diplopia Occurred Outside of and Some Distance From the Grounds of the United States Embassy in Bangkok, Thailand.

The activities by reason of which plaintiff seeks to hold the United States liable consists solely of an alleged incident occurring in a foreign country. As already pointed out, none of the alleged acts occurring in the Embassy grounds are related to plaintiff's alleged injury. Since plaintiff was free at all times to go to any doctor she wished, but availed herself of the free facilities of the Medical Unit for several months instead, at Government expense, it can be inferred from plaintiff's conduct that she was satisfied with the treatment she was receiving from the Medical Unit. Her referral to Dr. Chou Chuang Svetarundra was not due to the fact that she was dissatisfied with the Medical

Staff's treatment of her condition, but was rather due to the fact that the Medical Unit diagnosed her condition as requiring surgery, and recommended that she go to a specialist. The operation performed by Dr. Chou Chuang Svetarundra occurred at the Bangkok Nursing Home, and was performed by Dr. Chou Chuang Svetarundra, assisted by other Thai personnel at the hospital, but no American physicians participated in the operation. Dr. Cohen merely observed the operation so that he could learn how it was done. See memorandum filed by appellant September 7, 1962, exhibit attached thereto, page 2. Dr. Cohen was not "scrubbed" for the operation.

A complaint for negligent misrepresentation (and intentional misrepresentation as well) does not state a claim against the Government under Title 8, U. S. C. § 2680(h). See *Jones v. United States,* 207 F. 2d 563 (2d Cir.); *Natl. Mfg. Co. v. United States,* 210 F. 2d 263 (8th Cir.); *Clark v. United States,* 218 F. 2d 446 (9th Cir.); *Hall v. United States,* 274 F. 2d 69 (10th Cir.); *United States v. Neustadt,* 366 U. S. 696, 81 S. Ct. 1294. See also, *Miller v. United States,* 241 F. 2d 781 (2d Cir.).

The referral by Dr. Cameron or Capt. Cohen of the appellant to Dr. Chou Chuang Svetarundra or Dr. Kobchai, whether negligent or not, is attacked by the appellant as a false representation by the medical staff members to the appellant that Dr. Chou Chuang Svetarundra was qualified to perform the operation under the conditions prevailing in the Bangkok Nursing Home. Even if the referral of the plaintiff to Dr. Chou Chuang Svetarundra had been negligent (which

the United States flatly denies), such claim is not actionable under Section 2680(h).

What acts then, does plaintiff allege to have occurred on the premises of the United States Embassy in Bangkok which caused her diplopia? No measures taken by the Medical Staff at the Embassy were surgical in nature. The drugs administered were mild. But the most significant fact which should here be considered is that the operation performed by Dr. Chou Chuang Svetarundra of Thailand was a completely independent superseding event which broke any chain of causation between plaintiff's injury and any of the acts occurring in the Medical Unit at the United States Embassy. Plaintiff should not be heard to allege that, on the one hand, her diplopia was caused by injury to a nerve occurring during a Caldwell-Luc operation and, on the other hand, that the nerve was injured by any failure of the Medical Staff at the United States Embassy to promptly diagnose her condition as requiring a Caldwell-Luc operation. As already pointed out, appellant does not claim that the diagnosis of Drs. Cohen and Cameron was wrong. Nor did they represent themselves as being eye, ear, nose and throat specialists to appellant. Certainly, appellant cannot claim that anything Dr. Cameron or Dr. Cohen did either increased the seriousness of the chronic sinus condition or caused plaintiff's diplopia. The record reveals nothing to support such a claim. Nor does the record show that anything that could have been done at Clark Field in the Philippine Islands could have prevented the diplopia from occurring, even if the Caldwell-Luc operation had been performed in the Philippines rather than in Thailand.

Moreover, plaintiff need not have abided by the list of physicians recommended by the Medical Unit Staff at the United States Embassy in Bangkok. Please see paragraph 3, first page of the Affidavit of Dr. Lewis K. Woodward, Jr., an exhibit attached to the Government's Second Motion for Summary Judgment, filed November 11, 1962. See also on this point, the Affidavit of Dr. Chou Chuang Svetarundra, also attached as an exhibit to the Government's Second Motion for Summary Judgment, filed November 11, 1962.

The first diagnosis of diplopia was made by Dr. Kobchai Prommindaraj, Professor of Ophthalmology at Chulalongkorn Medical School, Thailand, who diagnosed the plaintiff's condition as diplopia after the Caldwell-Luc operation. Dr. Thomas Tredici, at Clark Field, Philippine Islands, an employee of the United States, diagnosed the plaintiff in complete accord with the diagnosis of Dr. Kobchai. The harm occurring to the plaintiff was the result of some damage to an eye nerve. The plaintiff never experienced any diplopia until after the Caldwell-Luc operation. Dr. Kobchai and Dr. Tredici would not commit themselves that the nerve was damaged as a result of the Caldwell-Luc operation. They said that such had never yet been the result of a Caldwell-Luc operation, in their experience. But giving the plaintiff the benefit of the doubt, and assuming *arguendo* only that the Caldwell-Luc operation caused the nerve injury, no part of said operation took place on the United States Embassy premises, and no part of said operation was performed or supervised by United States Government personnel. The record is clear and unequivocal on this point.

If plaintiff is claiming that the failure of Drs. Cohen and Cameron to diagnose her condition as being one requiring surgery was negligence, what law would then apply with regard to the standard of care required? Obviously, the law of Thailand would control. Appellee therefore contends that Section 2680(k) would bar the plaintiff's claim.

The record indicates that the plaintiff never complained of nor noticed diplopia until after the Caldwell-Luc operation. And plaintiff has never claimed that a sinus condition alone could have caused her diplopia. But even if plaintiff had claimed that the serious, chronic sinus condition experienced by her could have caused her diplopia, the United States cannot be held responsible for having caused such sinus condition, as it pre-existed the plaintiff's arrival in Thailand.

All of the aforementioned facts and contentions of fact are simply pointed out for the purpose of showing that no act or event having a causal relationship to the appellant's diplopia actually occurred on the grounds of the United States Embassy in Bangkok, Thailand. Although the plaintiff obviously could not get along in the climate of Bangkok, Thailand, and her chronic sinus condition was steadily worsening, she chose to remain in Thailand; certainly she cannot contend that she would have been denied a request for return passage to the United States.

Plaintiff says, on page 10 of her brief, that sovereignty is a principle not based on acts of Congress. The Tort Claims Act is, however, based entirely on enactments of Congress, as evidenced by 28 U. S. C. § 2680(k) and 28 U. S. C. A. § 2680(h), as well.

III.

Even Assuming Arguendo That Some Act or Event Allegedly Occurring on the United States Embassy Grounds in Bangkok, and Committed by United States Employees, in Some Way Contributed to Plaintiff's Diplopia, No Judicial Decision Has Construed 28 U. S. C. §2680(k) as Meaning That "Foreign Country" Does Not Include a United States Embassy Abroad, for Purposes of the Tort Claims Act.

In addition to the citations already presented above, appellee wishes to point out the case of *Acheson v. Kuniyuki,* 189 F. 2d 741 (9th Cir.), in which the Ninth Circuit Court of Appeals quoted statements made by Judge Yankwich in the case of *Uyeno v. Acheson*, D.C. Wash. 25, 96 F. Supp. 510, *supra.*

The appellant has designated, as part of the record on appeal, the deposition of Dr. Herbert I. Cohen, filed on September 10, 1962. But if either the United States or the appellant desired to take the depositions of other parties involved, such as Dr. Chou or Dr. Kobchai, or Dr. Tredici, or even Dr. Cameron, the chances are excellent that those persons would be found in faraway countries, requiring that counsel for the United States travel many thousands of miles under uncertain conditions in order to participate in the taking of such depositions. In addition, the nurse who assisted Dr. Chou Chuang Svetarundra in the operation would be a person whose deposition would presumably have to be taken, and she still resides in Bangkok, Thailand. Language problems would present themselves both in the questioning of witnesses in Thailand, and in presenting to the trial court the laws of

Thailand relating to negligence of physicians. Thus, the purpose of Section 2680(k) is obvious.

Nevertheless, appellee respectfully represents to this Court that the Government of the United States has done everything possible, through the furnishing of free medical care to the plaintiff, in an attempt to bring about a cure of plaintiff's condition. No doubt, plaintiff will be entitled to free medical care for many years to come, for every attempt will be made by Government medical physicians to restore her proper vision. While no monetary value can be placed on these free services, it cannot be said that the plaintiff has been entirely without a remedy for her injury. A private bill, submitted to Congress, might furnish her with some additional monetary remedy, although counsel for the appellee naturally cannot represent to this Court that such private legislation could be successfully pursued by the plaintiff.

As part of the military mission of the United States in Thailand, the plaintiff's husband was serving his country in the Armed Forces in a fashion which *per se* involved some danger to himself. Appellant accompanied her husband to Thailand and was herself exposed to the same hazards. The Congressional mandate set forth in Title 28 U. S. C. § 2680(k), must be interpreted as precluding her recovery of monetary damages for her injury, under the circumstances.

Compare Title 10, U. S. C. A., Section 2734.

Conclusion.

No material issues exist which might effect the application of Title 28 U. S. C. 2680(k) in the case at bar. The undisputed facts show a series of events occurring in Bangkok, Thailand, culminating in appellant's present condition of double vision in her right eye. Appellant's own memorandum, filed September 7, 1962, asserts that Dr. Cohen did no more than observe the Caldwell-Luc operation, and that appellant decided on her own to submit to said operation by Dr. Chou, a Thai physician specializing in ear, eye, nose and throat practice. Appellant at no time indicated by her conduct that she was dissatisfied with treatment rendered at the United States Medical Clinic in Bangkok. Her worsened sinus condition was neither caused nor added to by the Government doctors in Bangkok. The Medical Unit at the Embassy was not staffed or equipped to do more for appellant than it did. Appellant could have returned to the continental United States but chose to remain with her husband in Thailand, despite her serious sinus condition. The Medical Unit in Bangkok referred appellant to a specialist whose reputation is unassailed. Appellant contends these facts do not constitute valid reason for circumventing the clear language in Section 2680(k).

Respectfully submitted,

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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

GORDON P. LEVY